

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
)
LAKE MADRONE WATER DISTRICT)
)
For Review of Adoption of Cleanup and)
Abatement Order Issued on November 29,)
1984 of the California Regional Water)
Quality Control Board, Central Valley)
Region. Our File No. A-370 and)
A-370(a).)
_____)

ORDER NO. WQ 85-10

BY THE BOARD:

On November 29, 1984 the Executive Officer for the California Regional Water Quality Control Board, Central Valley Region, issued a Cleanup and Abatement Order to address the problem of sediment deposits in Lake Madrone and in Berry Creek. On December 28, 1984, Lake Madrone Water District filed an incomplete petition. On March 28, 1985 said petition was completed. In addition, C. C. Charity filed an incomplete petition on this matter on January 30, 1984. Said petition was completed on March 11, 1985. On March 14, 1985 a letter requesting withdrawal of the petition was received from C. C. Charity. Said request was acknowledged on April 11, 1985. On May 29, 1985, a request for reinstatement of the petition was received from C. C. Charity. We will address Ms. Charity's concerns on our own motion.

I. BACKGROUND

Lake Madrone Water District (District) owns and operates Lake Madrone on Berry Creek in Butte County 15 miles from Oroville.

Lake Madrone discharges to Berry Creek which flows to Lake Oroville. The beneficial uses of Berry Creek and Lake Oroville are domestic supply,

agricultural supply, recreational, esthetic enjoyment, preservation and enhancement of fish, wildlife, and other aquatic resources.

Lake Madrone was built as a recreational lake approximately 50 years ago. The Board of Directors of the District direct the manner in which discharges from Lake Madrone to Berry Creek take place. Discharges may occur in the following ways--through siphons, a spillway or a gate valve. The normal means of discharge is through the siphons which take water from near the Lake surface. Extremely high lake levels can cause discharges over the spillway. The gate valve, located near the bottom of the dam, may be operated at any time to drain water from the Lake. The gate valve is the only means of emptying the Lake when the water level falls below the siphon inlets. The gate valve has been used to empty the Lake so that accumulated sediments could be removed from the bottom by heavy equipment.

The central issue involves the large deposits of sediment that have accumulated in Lake Madrone. In 1984 concerns were raised that discharges from the Lake were causing siltation problems in Berry Creek.

A representative of property owners downstream from Lake Madrone, Hamilton Holt, Jr., requested that the Regional Board hold a hearing to address the sedimentation problem. On October 5, 1984, the California Department of Fish and Game (DFG) reported that deposits of sediment filled pools in Berry Creek with at least one foot or more of sediment. In addition DFG reported that the sediment severely damaged the fishery by destroying shelter and food producing areas. On November 29, 1984, pursuant to Water Code Section 13304, the Executive Officer issued a Cleanup and Abatement Order in response to these concerns. The order contains findings that the District discharged earthen materials to Berry Creek which caused conditions of pollution and nuisance.

The order requires petitioner to cease from opening the gate valve until procedures for operating the valve are adopted that will prevent earthen materials from being discharged into Berry Creek at a rate greater than said materials enter Lake Madrone. The order did not address what to do about existing sediment problems in Berry Creek. The District has petitioned for review of this action, basically contending that the Regional Board acted in excess of its jurisdiction. Conversely, Ms. Charity's concerns revolve around her belief that the Regional Board has not gone far enough to protect Berry Creek.

II. CONTENTIONS AND FINDINGS

We will first address the contentions of the District.

1. Contention: Petitioner asserts that no discharges of waste are occurring and therefore that the Regional Board did not have jurisdiction to issue its order. The District specifically alleges that the materials passing through the gate valve of the Lake Madrone Dam (silt) are not "waste", as applied to petitioner, in that they are not sewage or the substances associated with human habitation, or of human or animal origin, and are not from any producing, manufacturing, or processing operation. (Water Code Section 13050(d).)

Finding: We disagree with petitioner's contention that no discharges of waste have taken place.

The "Note" section immediately following the above-cited statute states "that the definition of waste is intended to include all interpretations of the Attorney General of 'sewage', 'industrial waste', and other waste under the

former act." The "Note" section also contains a citation to 27 Ops.Cal.Atty.Gen. 182, an opinion in which it was held that fine grained materials and eroded earth do constitute waste that could result pollution. (See 27 Ops.Cal.Atty.Gen. at p. 184.) Furthermore, in 43 Ops.Cal.Atty.Gen. 302 the issue of whether silt discharged from a dam constitutes waste was answered in the affirmative. Clearly, the earthen material passing through the gate valve at Lake Madrone does constitute waste.

2. Contention: Petitioner next contends that it is not a discharger of waste. The District argues that the source of the silt is from upstream properties and that its action in releasing silt to downstream areas is not a discharge.

Finding: We find petitioner's contention to be without merit. While the petitioner may not be the actual source of the silt (silt is washed into the Lake from upstream properties), nevertheless, it does operate the gate valve and thus controls the manner in which releases occur. The Water Code does not define the term "discharge". However, we find the term to cover releases from the District's facilities. What petitioner seems to be asserting is the "net" versus "gross" issue. That is, petitioner argues that it should only be responsible for wastes which it actually adds to the water. We disagree. The courts have clearly held that the Water Boards have jurisdiction to regulate discharges of waste on a gross, rather than net, basis. [Southern California Edison Co. v. State Water Resources Control Board, 116 Cal.App.3d 751, 172 Cal.Rptr. 306 (1981).] Water Code Section 13304 does not look to the source of the waste, it simply regulates the discharge of waste to waters of this state.

3. Contention: The order is improperly issued in that it is in effect a cease and desist order imposed without benefit of due notice and

hearing as required by Water Code Section 13302 and by constitutional precepts of due process of law.

Finding: The Water Code Section cited by the petitioner in support of the third contention refers to the hearing procedures for a cease and desist action only.

Petitioner's contention followed to its logical conclusion would impose the requirements of Water Code Section 13302 (Cease and Desist Enforcement) to a cleanup and abatement order issued pursuant to Water Code Section 13304. However, the Legislature established the cease and desist order and the cleanup and abatement order as two distinct enforcement options. The cleanup and abatement order is utilized to correct conditions of pollution or nuisance or to abate conditions threatening pollution or nuisance. The Legislature specifically set up a process whereby a Regional Board Executive Officer could act expeditiously to correct water quality problems. We find the procedures established by the Legislature to comport with due process requirements. Even if we felt otherwise, we would be constrained by the State Constitution from interpreting the statute to be unconstitutional (California Constitution, Article 3, Section 3.5). In sum, we reject petitioners argument that a hearing must precede adoption of a cleanup and abatement order.

In reviewing the record, it is evident that the Cleanup and Abatement Order was the correct enforcement action to take in this matter.

First, issuing a cease and desist order was not a viable option. Petitioner does not have waste discharge requirements.

Second, the field inspections conducted of Lake Madrone Dam indicated the existence of a severe problem that was becoming worse. On three different

occasions, spanning from March to August 1984, field inspections were conducted. The severity of the silt deposits resulted in the following:

1. The pools and shore line of Berry Creek were filled in.
2. Vegetation growth occurred in the silt in the middle and along the shoreline of Berry Creek.
3. The silt deposits reduced the open gravel areas needed by fish and aquatic life for spawning.

In further support of the due process contention, the petitioner cites the case of Fascination, Inc. v. Houver (1952) 39 Cal.2d 260, 246 P.2d 656.

The facts of that case are summarized as follows: local officials were required to approve the game "Fascination" to insure compliance with applicable laws and ordinances before a license to conduct said amusement business could be issued.

The court concluded among other things that since the officers were required to make a mixed factual and legal determination in order to ascertain whether the game would comply with the applicable laws and ordinance that a notice and hearing was warranted since this type of decision is quasi-judicial. (Fascination at P. 662.)

The case is distinguishable from the matter before the Board because it involved the issuance of a license, without which the amusement business could not be operated.

In this matter, the legal rights affected are minimal. The petitioner can continue to operate the dam so long as discharges of silt cease and prior to opening the valve procedures for operation of said valve be adopted.

Finally, petitioner was given the opportunity to present its case to the Regional Board even after the Cleanup and Abatement Order was adopted. By

letter dated January 7, 1985, the petitioner was invited to meet with the Executive Officer to discuss the Cleanup and Abatement Order. The petitioner declined to attend the meeting. On January 25, 1985, this matter was presented to the Regional Board as an information item. Arguments were made to the Board by the petitioner. The Board however did not express any disagreement with the order nor did they change or revoke said order. In essence, the Regional Board ratified the order.

5. Contention: (a) The findings set forth in the Order are not supported by the evidence.

(b) The findings in the order do not support the action.

These contentions have both been discussed previously in the order. In summary, the record supports the issuance of a cleanup and abatement order. The findings in said order support the action taken by the Regional Board. We will now address Ms. Charity's contention that the Regional Board action did not go far enough.

6. Contention: The Cleanup and Abatement Order failed to order cleanup of Berry Creek.

Finding: The Cleanup and Abatement Order does not include language specifically requiring the discharger to address the existing problem of sediment accumulation in Berry Creek below Lake Madrone. Evidently, the Regional Board felt that spring 1985 runoff would flush the sediments from Berry Creek into Lake Oroville. However, we take administrative notice that runoff in 1985 was not heavy and that a sediment problem remains today in Berry Creek below Lake Madrone.

We find that the Cleanup and Abatement Order did not go far enough in addressing the issue of removal of sediment from Berry Creek. Water Code Section 13320(c) sets forth the following:

"...upon finding that the action of the regional board, or the failure of the regional board to act, was inappropriate or improper, the state board may direct that the appropriate action be taken by the regional board, refer the matter to any other state agency having jurisdiction, take the appropriate action itself, or do any combination of the foregoing. In taking any such action, the state board is vested with all the powers of the regional boards under this division."

Therefore, the Board orders the discharger to submit a plan for sediment removal from Berry Creek to the Regional Board no later than three months from the date the order is issued. Said report shall include a discussion regarding the use of releases from Lake Madrone to augment the high seasonal flows to flush sediment from Berry Creek and a time schedule for corrective action. The Regional Board shall review the plan at a meeting and determine what action is appropriate.

III. CONCLUSIONS

1. The District is a discharger of waste and as such subject to regulation by the Regional Board.
2. The Regional Board acted within its statutory authority in issuing a cleanup and abatement order without a hearing.
3. The record before the Regional Board supports the issuance of a cleanup and abatement order.
4. The cleanup and abatement order should have addressed the issue of existing sediment problems in Berry Creek.

IV. ORDER

1. The petition of the District is denied.
2. The District shall, within three months of the date of this Order, provide the Regional Board with a plan for removing sediment from Berry Creek. This plan shall consider the use of releases from Lake Madrone to augment the high seasonal flows to flush sediment from Berry Creek and shall include a time schedule for corrective action. The Regional Board shall review the plan at a meeting and determine what action is appropriate.

V. CERTIFICATION

The undersigned, Executive Director of the State Water Resources Control Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 17, 1985.

Aye: Raymond V. Stone
 Darlene E. Ruiz
 E. H. Finster

No: None

Absent: None

Abstain: Eliseo M. Samaniego



Raymond Walsh
Interim Executive Director

